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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~[illegible] 70~~ #9 1963

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE and JOHNNY CLARK,

Petitioners,

—v.—

THE CITY OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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Petitioners,

—v.—

THE CITY OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above entitled case on December 14, 1961 rehearing of which was denied January 8, 1962.

Citation to Opinions Below

The opinion of the Supreme Court of South Carolina, which opinion is the final judgment of that Court, is reported at 123 S. E. 2d 521 (1961) and is set forth in the appendix hereto, *infra*, pp. 8a-12a. The opinion of the Richland County Court is unreported and is set forth in the appendix hereto, *infra*, pp. 1a-7a.

Jurisdiction

The Judgment of the Supreme Court of South Carolina was entered December 14, 1961, *infra*, p. 12a. Petition for rehearing was denied by the Supreme Court of South Carolina on January 8, 1961, *infra*, p. 13a.

Questions Presented

1. Whether the Court below denied petitioners' rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States to freedom from state supported racial discrimination and freedom of expression, where petitioners have been convicted of the crimes of trespass and breach of the peace for having remained seated at the lunch counter of a licensed drug store which was open to the public (including petitioners), but was pursuing a practice of serving Negroes take-out food orders only while serving white persons at counter seats, in conformity with state custom of segregation, and where petitioners were ordered to leave solely on the basis of race and were arrested and convicted in support of the racially discriminatory practice.

2. Whether petitioners were denied their rights to free expression as protected by the due process clause of the Fourteenth Amendment:

(a) when convicted for engaging in a sit-in protest demonstration,

(b) and when said convictions were under statutes so vague as to give no fair warning that their conduct was prohibited.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Section 16-386, Code of Laws of South Carolina, 1952, as amended 1960:

> 16-386 Entry on lands of another after notice prohibiting same.
>
> Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing.

3. This case involves Section 15-909, Code of Laws of South Carolina, 1952:

> 15-909 Disorderly Conduct, etc.
>
> The mayor or intendant and any alderman, councilman or warden of any city or town in this State may in person arrest or may authorize and require any marshall or constable especially appointed for that purpose to arrest any person who, within the corporate limits of such city or town, may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness, or any other conduct

grossly indecent or dangerous to the citizens of such city or town or any of them. Upon conviction before the mayor or intendant or city or town council such person may be committed to the guardhouse which, the mayor or intendant or city or town council is authorized to establish or to the county jail or to the county chain-gang for a term not exceeding thirty days and if such conviction be for disorderly conduct such person may also be fined not exceeding one hundred dollars; provided that this section shall not be construed to prevent trial by jury.

Statement

Petitioners, five Negro students, were arrested for participating in a sit-in demonstration at the Taylor Street Pharmacy in the City of Columbia, South Carolina, and were convicted of trespass and breach of the peace in violation of Section 16-386, as amended, and Section 15-909, respectively, of the Code of Laws of South Carolina, 1952 (R. 1). They were sentenced to pay a fine of one hundred dollars on each charge, or serve thirty days on each charge (R. 1).

Petitioners, students at the nearby Benedict College, entered the Taylor Street Pharmacy on March 15, 1960 in the afternoon. They proceeded to the lunch counter in the rear of the store, after some had made purchases in the front portion, and seated themselves at the lunch counter (R. 9, 39). The policy of the store was to serve Negroes on the same basis as whites at all places in the store except the lunch counter (R. 23). At the lunch counter Negroes could secure food to be removed from the store, but were not to sit at the counter and eat their purchases (R. 24). There was a general sign that the manager reserved the

right to refuse service, but there was no sign specifically barring use of the counter by Negroes (R. 25). The State police had alerted the manager that a sit-down demonstration would occur, and had detailed three policemen to the store (R. 3, 25). As petitioners sat down some of the white patrons at the counter stood up (R. 17). The manager came to the counter and informed petitioners that they "might as well leave" because they would not be served (R. 32). Petitioners did not leave at this request (R. 32). Police Officer Stokes then directed the manager to request again that petitioners leave, which he did (R. 18). Shortly thereafter the police officers arrested petitioners (R. 5). The manager had left the luncheon area after his announcement to the petitioners, and the police officers arrested petitioners without a direct request from him (R. 19, 21). The co-owner of the restaurant in addition to being informed by the police of the coming demonstration, testified that: "We [the police and himself] had a previous agreement to the effect, that if they did not leave, they would be placed under arrest for trespassing" (R. 29), and later:

> "Q. Was it your idea to have these defendants arrested, or was it the idea of the police department? A. I'll put it that it was the both of us' idea, that if they were requested to leave and failed to leave, that they would be arrested" (R. 30).

The petitioners were well-dressed, orderly and did not physically interfere with any other customers throughout the whole of their request for service at the lunch counter (R. 8, 27). The co-owner of the restaurant replied affirmatively that there was no difference between the dress and demeanor of the petitioners and other customers "other than the color of their skin" (R. 27).

How the Federal Questions Were Raised

At the close of the trial in the Recorder's Court of the City of Columbia, petitioners moved to dismiss the charges against them alleging: the evidence showed the arrests were State enforcement of discrimination based solely on the petitioners' race and that petitioners were deprived of the liberty of protesting segregation through requesting to be served as others; all in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (R. 46-50). The motion was denied (R. 50-52). Defendants also moved for arrest of judgment, or in the alternative, for a new trial raising the same issues as raised under the motion to dismiss (R. 54-55). These motions were denied (R. 55).

After considering petitioners' exceptions (R. 57), the Richland County Court, on appeal held:

> The State has not denied Defendants equal protection of the laws or due process of law within the Federal or State constitutional provisions.
>
> And the proprietor can chase his customers without violating constitutional provisions. *State* v. *Clyburn*, 101 S. E. (2d) 295, 247 N. C. 455; *Williams* v. *Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack* v. *Atlantic White Towers, etc.*, 181 F. Supp. 124 (Dist. Court Md.) 284 F. (2d) 746" (R. 58).

In appealing to the Supreme Court of South Carolina, petitioners set forth the following exceptions to the judgment below (R. 63-64).

Exceptions

3. The Court erred in refusing to hold that the evidence shows conclusively that the arresting officers

acted in the furtherance of a custom, practice and policy of discrimination based solely on race or color, and that the arrests and convictions of appellants under such circumstances are a denial of due process of law and the equal protection of the laws, secured to them by the Fourteenth Amendment to the United States Constitution.

4. The Court erred in refusing to hold that the evidence establishes merely that at the time of their arrests appellants were peaceably upon the premises of Taylor Street Pharmacy as customers, visitors, business guests or invitees of a business establishment performing economic functions invested with the public interest, and that the procurement of the arrest of appellants by management of said establishment under such circumstances in furtherance of a custom, practice in and policy of racial discrimination is a violation of rights secured appellants by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The Supreme Court of South Carolina disposed adversely of all of petitioners' constitutional claims. After a summary of the facts, the court stated:

The questions involved are stated in appellants' brief as follows:

1. Did the Court err in refusing to hold that under the circumstances of this case, the arrests and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4.)

A. Was the enforcement of segregation in this case by State Action within the meaning of the Fourteenth Amendment?

B. Were appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?

The questions designated 1, A and B, must be decided adversely to appellants under City of Greenville v. Peterson, filed November 10, 1961, —— S. C. ——, —— S. E. (2d) ——, and City of Charleston v. Mitchell, filed December 13, 1961, —— S. C. ——, —— S. E. (2d) ——. Each of these cases involved a sit-down demonstration at a lunch counter in a privately owned place of business and the precise questions raised by Exceptions 3 and 4 in the instant case were raised in those cases and overruled. In the City of Charleston case we affirmed a conviction for violation of Section 16-386 as amended, which is the same section under which the appellants were convicted.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Prior Decisions of This Court Which Condemn the Use of State Power to Enforce a State Custom of Racial Segregation.

In this case it is clear that the petitioners were refused service, ordered to leave the lunch counter, arrested and convicted of crimes on the basis of their race pursuant to and in the enforcement of a policy of racial discrimination. It is undisputed that the practice of the Taylor Street Pharmacy was to stand ready to serve food at its lunch counter seats to white persons and to refuse such service to all Negroes; that it was the policy to serve Negroes only when they were taking the food elsewhere to eat; and that petitioners were refused service solely because of their race and for no other reason. It is also apparent that the arrests were made to support this discrimination, and that

the trial court convicted petitioners on evidence plainly indicating that race, and race alone, was the reason they were ordered to leave the lunch counter, and consequently arrested and charged upon their failure to leave. This is thus a case where the difference in treatment to which petitioners have been subjected is clearly a racial discrimination.

There are several dominant and relevant components of action by state officials in the chain of events leading to appellants' conviction and punishment for violating the racially discriminatory customs. The police alerted the co-owner of the store that an attempt to integrate the lunch counters would occur on the day the petitioners frequented the store (R. 3, 25). They had made an agreement with this proprietor to secure the arrest of the petitioners and had dispatched an extra detail of police to the premises prior to petitioners' arrival (R. 3, 25). Although one police officer testified he was only on the scene to prevent violence (R. 7) the co-owner testified that the prearranged plan with the police was for the petitioners to be arrested if they failed to conform to requests to leave the white lunch counter (R. 30). It was the police officer who directed the manager to give the final request to the petitioners to leave (R. 18). Here, as in all criminal prosecutions, there is further state action by state officers in the persons of the prosecutors and judges; the official actions of such officers are "state action" within the meaning of the Fourteenth Amendment under clear authorities. The subject of judicial action as "state action" was treated exhaustively in part II of Chief Justice Vinson's opinion in *Shelley* v. *Kraemer*, 334 U. S. 1, 14-18; cf. *Boynton* v. *Virginia*, 364 U. S. 454. Policemen (*Screws* v. *United States*, 325 U. S. 91; *Monroe* v. *Pape*, 365 U. S. 167) and prosecutors (*Napue* v. *Illinois*, 360 U. S. 264) are equally subject to the restraints of the Fourteenth Amendment.

Ever since the *Civil Rights Cases*, 109 U. S. 3, 17, it has been conventional doctrine that racial discrimination when supported by state authority, violates the Fourteenth Amendment's equal protection clause; and since *Brown* v. *Board of Education*, 347 U. S. 483, it has been settled that racial segregation constitutes a forbidden discrimination.

However, in this case the involvement of the public law enforcement and judicial officers in the racial discrimination practiced against petitioners through their use of the state's criminal law machinery to support and enforce it, is now sought to be excused because, it is said, there is also "private action" in the picture, and the state is said to be merely enforcing "private property" rights through its criminal trespass and breach of the peace laws. It is argued that the state is not really excluding and punishing Negroes, but only "trespassers" inciting a breach of the peace, and that the state stands ready to punish whites in these circumstances as well. While petitioners are aware of no case of a white person convicted for refusing to leave an all-Negro establishment under a trespass or breach of the peace law,[1] there is no reason to doubt that this might occur in communities deeply wedded to the segregation customs. The answer made to a parallel argument in *Shelley* v. *Kraemer*, 334 U. S. 1, 22, is apt—"Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

But the argument that it is only trespassers inciting a breach of peace and not Negroes qua Negroes who are punished by the State, and thus it is private property rights and order and not racial discrimination that is being preserved by the state's officers and laws, requires further anal-

[1] White persons have been convicted for trespass when in company with Negroes in "white only" establishments. *Avent* v. *North Carolina*, No. 85, October Term 1961.

ysis. We shall examine in turn, the specific nature of the property right and the state's legitimate interests including protection of the right to privacy and general tranquility, and their relation to state customs and laws.

As a starting point it is fit to observe, as this Court did in *Shelley* v. *Kraemer, supra,* that the mere fact that property rights are involved does not settle the matter. The Court said at 334 U. S. 1, 22:

> "Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. *Marsh* v. *Alabama,* 326 U. S. 501, 90 L. ed. 265, 66 S. Ct. 276 (1946)."

This Court has said on several occasions, "that dominion over property springing from ownership is not absolute and unqualified." *Buchanan* v. *Warley,* 245 U. S. 60, 74; *United States* v. *Willow River Power Co.,* 324 U. S. 499, 510; *Marsh* v. *Alabama,* 326 U. S. 501, 506; cf. *Munn* v. *Illinois,* 94 U. S. 113. As the Court said in *Marsh, supra,* "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793, 796, 802."

Because it does matter a great deal what kind of property interest is being created and enforced by the State in given circumstances, we must inquire: What is the nature of the property right of the Taylor Street Pharmacy which is being enforced by the state in the criminal trespass charge?

The Taylor Street Pharmacy used the premises involved in its commercial business as a drug store opened to the public generally for the transaction of business including the sale of food and beverages at its lunch counter. This case does not involve enforcement of a general desire to keep everyone, or Negroes, or even these petitioners, from coming upon the premises. The white public was invited to use all the facilities of the drug store, and the Negro public was invited to use all facilities except the lunch counter stools. Negroes were even welcomed to purchase food at the lunch counter provided they stood up to purchase it and left the store to eat. The property interests enforced for the Taylor Street Pharmacy do not involve the integrity of a portion of its premises set aside for non-public use, such as space reserved for the owner or its employees. Nor does the property interest enforced here relate to an owner's claim that a portion of its premises is being sought to be used for a purpose alien to its normal or intended function. Petitioners merely sought to use a lunch counter stool while consuming food sought to be purchased on the premises, the purpose for which the stools were being maintained. The state is not being called upon here to enforce a property owner's general desire not to sell its goods to Negroes, since food and beverages were offered for sale to Negroes at this counter if they remained standing and took their purchases away with them. And further the proprietor himself, by opening every other department of his store to Negroes on the same basis as whites, has in the most affirmative manner possible stated that the mere fact of the purchaser's race is not disruptive of any operating business.

The property interest which *is* being enforced here is a claimed right to open premises to the public generally (including Negroes) for business purposes, including the sale of food and beverages, while racially discriminating against Negroes qua Negroes at one of the facilities for the public in the business premises—including a claimed right to have Negroes arrested and criminally punished for failing to obey the owner's direction for them to leave this portion of the store. This claimed property right—the right to racially discriminate against Negroes with respect to being seated in the circumstances indicated—is indeed a type of property interest. The question remains whether the States' laws can give recognition and enforcement to such an interest without violating the Fourteenth Amendment.

Petitioners submit that it is readily apparent that the property interest being enforced against them on behalf of the Taylor Street Pharmacy, bears no substantial relation to any constitutionally protected interest of the property owner in privacy in the use of his premises. The State is not in this prosecution engaged in protecting the right to privacy. It has long been agreed by the courts that a state can "take away" this property right to racially segregate in public accommodation facilities without depriving an owner of Fourteenth Amendment rights. *Western Turf Asso.* v. *Greenberg*, 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *Pickett* v. *Kuchan*, 323 Ill. 138, 153 N. E. 667, 49 A. L. R. 499 (1926); *People* v. *King*, 110 N. Y. 418, 18 N. E. 245 (1888); Annotation 49 A. L. R. 505; cf. *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100.

And indeed a great number of states in our Nation have enacted laws making it criminal to engage in just the type of racially discriminatory use of private property which the Drug Company seeks state assistance in preserving

here.[2] From the fact that the States can make the attempted exercise of such a "right" a crime, it does not follow necessarily and automatically that they must do so, and must refuse (as petitioners here urge) to recognize such a claimed property right to discriminate racially in places of public accommodation. But the fact that the States can constitutionally prohibit such a use of property and that when they do so they are actually conforming to the egalitarian principles of the Fourteenth Amendment (*Railway Mail Ass'n* v. *Corsi, supra*, at 93-94) makes it evident that the property interest asserted by the Taylor Street Pharmacy is very far from an inalienable or "absolute" property right. Indeed the property owner here is attempting to do something that the state itself could not permit him to do on state property leased to him for his business use (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 175), or require or authorize him to do by positive legislation (cf. Mr. Justice Stewart's concurring opinion in *Burton, supra*).

A basic consideration in this case is that the pharmacy lunch counter involved is a public establishment in the sense that it is open to serve the public and is part of the public life of the community (Mr. Justice Douglas, concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 176). As a consequence of the public use to which the property has been devoted by the owner, this case involves no real claim that the right to privacy is being protected by this use of the State's trespass laws. And, of course, it does not follow from the conclusion that the State cannot enforce the racial bias of the operator of a lunch counter open to the public, that it could not enforce a similar bias by the use of trespass laws against an intruder into a private dwelling or any

[2] See collections of such laws in Konvitz, *A Century of Civil Rights*, Passim (1961).

other property in circumstances where the state was exercising its powers to protect an owner's privacy. This Court has recently reiterated the principle that there is a constitutional "right to privacy" protected by the Due Process clause of the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643, 6 L. ed. 2d 1081, 1090, 1103, 1104; see also *Poe* v. *Ullman*, 367 U. S. 497, 6 L. ed. 2d 989, 1106, 1022-1026 (dissenting opinions). It is submitted that due consideration of the right to privacy affords a sound and rational basis for determining whether cases which might arise in the future involving varying situations should be decided in the same manner urged by petitioner here—that is, against the claimed property interest. Only a very absolutist view of the property "right" to determine those who may come or stay on one's property on racial grounds —an absolutist rule yielding to no competing considerations—would require that the same principles apply through the whole range of property uses, public connections, dedications, and privacy interests at stake. The Court has recognized the relation between the right of privacy and property interests in the past. See e.g. *Thornhill* v. *Alabama*, 310 U. S. 88, 105-106; *Breard* v. *Alexandria*, 341 U. S. 622, 626, 638, 644.

Petitioners submit that a property right to determine on a racial basis who can stay on one's property cannot be absolute at all, for this claimed right collides at some points with the Fourteenth Amendment right of persons not to be subjected to racial discrimination at the hand of the government. *Burton* v. *Wilmington Parking Authority, supra; Shelley* v. *Kraemer, supra.* Mr. Justice Holmes said in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355.

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the

neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Petitioners certainly do not contend that the principles urged to prevent the use of trespass laws to enforce racial discrimination in a lunch counter operated as a public business would prevent the state from enforcing a similar bias in a private home where the right of privacy has its greatest meaning and strength. A man ought to have the right to order from his home anybody he prefers not to have in it, and ought to have the help of the government in making his order effective. Indeed, the State cannot constitutionally authorize an intrusion into a privat home except in the most limited circumstances with appropriate safeguards against abuses. *Mapp* v. *Ohio, supra;* cf. *Frank* v. *Maryland,* 359 U. S. 360. Racial discrimination in a private home, or office, or other property where the right of privacy is paramount is one thing. Racial discrimination at a public counter is quite another thing indeed.

The involvement of the State of South Carolina as a whole entity in the present discrimination is so intimate and manifold that the state action standard may be satisfied or bolstered by other criteria than the participation of its police and courts in enforcing the discriminatory result complained of by petitioners. For racial discrimination has deep roots in South Carolina custom and law. "Custom" is specifically included in the opinion in the *Civil Rights Cases* as one of the forms of "state authority" which might be used in efforts to support a denial of Fourteenth Amendment rights (109 U. S. 3, at 17). See also Mr. Justice Douglas concurring in *Garner* v. *Louisiana,* 368 U. S. 157, 176.

The Taylor Street Pharmacy in excluding Negroes from its lunch counter was following a custom of segregating Negroes in public life which is characteristic of South Carolina as a community, and which custom has been firmed up and supported by the segregation policies and laws of South Carolina as a policy.[3]

The segregation laws form an edifice created by law—the systematic segregation of Negroes in public life in South Carolina. There is good ground for belief that the segregation system, of which the custom enforced by the Taylor Street Pharmacy is a part, was brought into being or at least given firm contour in its beginning, by State laws.

As Mr. Justice Douglas wrote recently concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 181:

> "Though there may have been no state law of municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic

[3] S. C. A. & J. R. 1952 (47) 2223, A. & J. R. 1954 (48) 1695 repealing S. C. Const. Art. II, §5 (1895) (which required legislature to maintain free public schools). S. C. Code §§21-761 to 779 (regular school attendance) repealed by A. & J. R. 1955 (49) 85; §21-2 (appropriations cut off to any school from which or to which any pupil transferred because of court order; §21-230(7) (local trustees may or may not operate schools); §21-238 (1957 Supp.) (school officials may sell or lease school property whenever they deem it expedient); S. C. Code §40-452 (1952) (unlawful for cotton textile manufacturer to permit different races to work together in same room, use same exits, bathrooms, etc., $100 penalty and/or imprisonment at hard labor up to 30 days; S. C. A. & J. R. 1956 No. 917 (closing park involved in desegregation suit); S. C. Code No. §§51-1, 2.1-2.4 (1957 Supp.) (providing for separate State Parks) §51-181.2 (separate recreational facilities in cities with population in excess of 60,000); §5-19 (separate entrances at circus); S. C. Code Ann. Tit. 58, §§714-720 (1952) (segregation in travel facilities).

to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law. If these proprietors also choose segregation, their preference does not make the action 'private', rather than 'state' action. If it did, a minuscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a state, it matters not that the agency to enforce it is a private enterprise. *Baldwin* v. *Morgan, supra; Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531."

Finally the property involved in this case is "affected with a public interest," *Munn* v. *Illinois*, 94 U. S. 113. By its use it has become "clothed with a public interest . . . [is] of public consequence, and affect[s] the community at large" (*Id.* at 126). This property is operated as a lunch counter under a license granted by the City of Columbia (R. 23). The licensing by the state demonstrates the public's interest in the business and the governmental recognition of this public character. As Mr. Justice Douglas stated concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 184: "A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public."

The charge of breach of the peace has the same posture as that of trespass and is even more simply a direct instance of state power being utilized to enforce segregation. There was absolutely no evidence of violence or threats of violence by petitioners directed toward anyone. The only testimony remotely resembling a disturbance of the peace was to the effect that some whites "stood up" when petitioners sat down; any inference of threatened violence by these persons would therefore stand on a weak reed. But even if the record contained a showing that these whites were about

to unlawfully attack petitioners, the prohibition of state enforcement of segregation under the Fourteenth Amendment is of course a rejection of all the reasons why segregation might be thought good, including fear of disorder. *Buchanan* v. *Warley, supra; Cooper* v. *Aaron*, 358 U. S. 1.

It is submitted that the totality of circumstances in this case, including the actions of the State's officers in arranging the arrests and prosecuting petitioners, the municipal licensing of the property involved and the consequent public character of the business property involved, the plain and invidious racial discrimination involved in the asserted property rights being protected by the state, the absence of any relevant component of privacy to be protected by the state's action in light of the nature of the owner's use of his property, and the state custom of segregation which has created or at least substantially buttressed the type of discriminatory practices involved, are sufficient to require a determination that the petitioners' trespass and breach of the peace convictions have abridged their rights under the Fourteenth Amendment.

II.

The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States.

Petitioners were engaged in the exercise of free expression by means of nonverbal requests for nondiscriminatory lunch counter service which were implicit in their continued remaining at the lunch counter when refused service. The fact that sit-in demonstrations are a form of protest and expression was observed in Mr. Justice Harlan's concurrence in *Garner* v. *Louisiana, supra*. Petitioners' expression (asking for service) was entirely appropriate to

the time and place at which it occurred. Petitioners did not shout, obstruct the conduct of business, or engage in any expression which had that effect. There were no speeches, picket signs, handbills or other forms of expression in the store which were possibly inappropriate to the time and place. Rather petitioners merely expressed themselves by offering to make purchases in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, *J.*, dissenting), and was within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 633-624 (flag salute); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (freedom of association).

Petitioners do not urge that there is a Fourteenth Amendment right to free expression on private property to all cases or circumstances without regard to the owner's privacy, and his use and arrangement of his property. This is obviously not the law. In *Breard* v. *Alexandria*, 341 U. S. 622 the Court balanced the "householder's desire for privacy and the publisher's right to distribute publications" in the particular manner involved, and upheld a law limiting the publisher's right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141 where different kinds of interests were involved with a corresponding difference in result.

As was true with the discussion above of the racial discrimination issue, so the free expression issue is not resolved merely by reference to the fact that private property rights are involved. The nature of the property rights asserted and of the state's participation through its of-

fieers, its customs, and its creation of the property interest, have all been discussed above in connection with the state action issue as it related to racial discrimination. Similar considerations should aid in resolving the free expression question.

In *Garner* v. *Louisiana*, Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. It is submitted that even absent the owner's consent for petitioners to remain on the premises of this pharmacy, a determination of their free expression rights requires consideration of the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action is supporting. *Marsh* v. *Alabama, supra.*

In *Marsh, supra*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize for their faith, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama, supra*, involving picketing on company-owned property; see also *N. L. R. B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); and compare the cases mentioned above with *N. L. R. B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 83 N. Y. S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a

trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by this trespass prosecution, is support of the property owner's discrimination in conformity to the State's segregation custom and policy. This is all that the property owner has sought.

Where free expression rights are involved, the questions for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck* v. *United States*, 249 U. S. 47, 52. The only "substantive evil" sought to be prevented by this trespass prosecution is the elimination of racial discrimination and the stifling of protest against it; but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination.

The fact that the arrest and conviction were designed to short circuit a bona fide protest is strengthened by the necessity of the state court to make a strained and novel interpretation of the statutes in order to bring petitioners' conduct within their ambit. Petitioners' conviction for trespass rests on an interpretation which flies in the face of the plain words of the statute, all prior applications, and ignores the most recent legislative amendment to said statute. The trespass statute prior to amendment read:

> Every entry upon the lands of another after notice from the owner or tenant prohibiting such entry shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon and shall publish once a week for four consecutive weeks such notice in any newspaper circulating in the county in which such lands are situated, a proof of the posting and of publishing of such notice within twelve months prior to entry shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of hunting or fishing on such land. (Code of Laws, South Carolina, 1952.)

The amended statute under which petitioners' convictions were had added the language which is italicized:

> Every entry upon the lands of another *where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another* . . .

The Legislature obviously limited the statute to trespass on land primarily used for farm purposes nor was this a major innovation, for petitioners have been able to find no cases under the instant criminal statute or its predecessors in which the trespass punished was not for entry on land (generally farm land) or some adjunctive land such as on the road. See *State* v. *Green*, 35 S. C. 266; *State* v. *Mays*, 24 S. C. 190; *State* v. *Tenney*, 58 S. C. 215; *State* v. *Hallback*, 40 S. C. 298; *State* v. *Gray*, 76 S. C. 83 (all cases of trespass on land or specifically farm land). The amendment was merely declaratory, making explicit on the face of the statute the prior applications. The action of the court

below in extending the statute to business premises is, therefore, completely novel and unsupported by prior cases or the recent amendment.

Further, the statute in terms prohibits only going on the land of another *after* being forbidden to do so. The Supreme Court of South Carolina has now construed the statute to prohibit also remaining on property when directed to leave the following lawful entry. In short, the statute is now applied as if "remain" were substituted for "enter." There is no history to support this second novel construction of the statute. No South Carolina case has ever adopted such a construction. The instant case is the first case which directly or indirectly convicts defendants who went upon business premises with permission and merely refused to leave when directed for unlawful "entry."

Subsequent to petitioners' conviction the legislature of the State of South Carolina enacted into law Section 16-388 a trespass statute making criminal failing and refusing "to leave immediately upon being ordered or requested to do so" the premises or place of business of another. See Petition for Writ of Certiorari in *Peterson, et al.* v. *City of Greenville,* filed in this Court February 26, 1962, 30 U. S. L. Week 3276.

There is no question but that petitioners and all Negroes were welcome within the Taylor Street Pharmacy—apart from the lunch counter stools. The lunch counter is an integral part of the store and can only be reached by "entry" into the store proper—to which petitioners were admittedly invited. Absent the special expansive interpretation given Section 16-386 by the Supreme Court of South Carolina the case would plainly fall within the principle of *Thompson* v. *City of Louisville,* 362 U. S. 199, and would be a denial

of due process of law as a conviction resting upon no evidence of guilt. There was obviously no evidence that petitioners entered upon land of a farmlike character "after having been forbidden to do so" and the conclusion that they did rests solely upon the special construction of the law.

The escape from invalidity of the conviction for lack of evidence of guilt via a construction completely unpredictable by the words of the statute or any prior applications renders the statue vague as being without sufficient prior definition of the acts prohibited. Under the novel interpretation conduct is reached which the words of the statute do not fairly and effectively proscribe, thus depriving petitioners of any notice that their acts would subject them to criminal liability.

The vice of vagueness is particularly odious where the right of free speech is put in jeopardy. Conduct involving free speech can only be prohibited within a statute "narrowly drawn to define and punish specific conduct as constitute a clear and present danger to a substantial interest of the state." *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 308; *Garner* v. *Louisiana*, 368 U. S. 157, 185 (Mr. Justice Harlan concurring). If the Supreme Court of South Carolina can affirm the convictions of these petitioners by such a construction they have exacted obedience to a rule or standard that is so ambiguous and fluid as to be no rule or standard at all. *Champlin Ref. Co.* v. *Corporation Com. of Oklahoma*, 286 U. S. 210. Such a result cannot but have a "potentially inhibiting effect on speech." *Smith* v. *California*, 361 U. S. 205, 210. But when free expression is involved, the standard of precision is greater; the scope of construction must, therefore, be consequently less. If this is the case when a State court limits a statute it must *a fortiori* be the case when a State court expands the mean-

ing of the plain language of a statute. *Winters* v. *New York*, 333 U. S. 507, 512.

The above threat to free speech is also present under the conviction for breach of the peace. Even under a strained inference that the standing up of the whites was a threat to attack the petitioners, such an attack would be completely unlawful. Yet, the imminence of such an attack *by others* is the sum and substance of the charge of breach of the peace *against petitioners*. Again, petitioners were not effectively warned by the statute that they were participating in criminal conduct solely by being present to protest racial segregation where others might do unlawful violence on their persons. Free speech was similarly denied by conviction under the breach of the peace statute which in no wise definitively prohibited petitioners' conduct.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE

RICHLAND COUNTY COURT

CITY OF COLUMBIA,

Respondent,

—v.—

BARR, *et al.*,

Appellants.

Order of the Richland County Court

These Appeals from the Recorder's Court of The City of Columbia were orally argued together before me and taken under advisement. The facts are largely undisputed. All of the Defendants are Negroes. Eckerd's Drug Store and Taylor Street Pharmacy are separate stores in The City of Columbia. Besides filling prescriptions, each sell drugs and sundries and has a section where lunch, light snacks and soft drinks are served. Trade is with the general public in all the departments except the lunch department where only white people are served.

On one occasion, Bouie and Neal went into Eckerd's and on another day the other Defendants went into the Taylor Street Pharmacy, sat down in the lunch department and waited to be served. All said they intended to be arrested. In each case, the manager of the store came up to them with a peace officer and asked them to leave. They refused to do so and were then placed under arrest and charged with trespass and breach of the peace. Bouie, in addition, was charged with resisting arrest. It is undenied that he resisted.

Order of the Richland County Court

Bouie and Neal were tried on March 25, 1960, and the other Defendants on March 30, 1960, before The Honorable John I. Rice, City Recorder of Columbia, without a jury; trial by jury having been waived by all the Defendants.

All the Defendants were convicted and sentenced and these appeals followed. Motions raising the constitutional questions were timely made.

There are 16 grounds of Appeals in the Bouie and Neal proceeding and 13 grounds of appeal in the proceeding involving the other Defendants, raising the following questions: (1) Did the State deny Defendants, who are Negroes, due process of law and equal protection of the laws within the Federal and State Constitutions either by using its peace officers to arrest them or by charging them with violating Sects. 16-386 (Criminal Trespass) and 15-909 (Breach of Peace) of the Code of Laws of South Carolina, 1952, as amended, when they refused to leave a lunch counter when asked by the manager thereof to do so? (Bouie and Neal Nos. 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15; other Defendants, Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13.) (2) Was there any substantial evidence pointing to the guilt of the Defendants? (Bouie and Neal, No. 8; other Defendants, No. 7.)

Since Defendants did not argue Bouie and Neal's Exceptions 7, 9 and 16, I have considered them abandoned.

The State has not denied Defendants equal protection of the laws or due process of law within the Federal or State Constitutional provisions.

A lunch room is like a restaurant and not like an inn.

The difference between a restaurant and an inn is explained in *Alpaugh* v. *Wolverton*, 36 S. E. (2d) 907 (Court of Appeals of Virginia) as follows:

Order of the Richland County Court.

"The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 A. Jr., Innkeepers, No. 120. p. 623; 43 C. J. S., Innkeepers, No. 20, subsection b, p. 1169. His responsibilities and rights are more like those of a shopkeeper. *Davidson* v. *Chinese Republic Restaurant Co.*, 201 Mich. 389, 167 N. W. 967, 969, L. R. A. 1919 E, 704. He is under no common-law duty to serve anyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. *Nance* v. *Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. (2d) 773, 776; *Noble* v. *Higgins*, 95 Misc. 328, 158 N. Y. S. 867, 868."

And the proprietor can choose his customers on the basis of color without violating constitutional provisions. *State* v. *Clyburn*, 101 S. E. (2d) 295, 247 N. C. 455; *Williams* v. *Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack* v. *Atlantic Whitetower, etc.*, 181 F. Sup. 124 (Dist. Court Md.), 284 F. (2d) 746.

In the *Williams* case, *supra*, Judge Soper, speaking for the Court of Appeals for The Fourth Circuit, said: "As an instrument of local commerce, the restaurant is not subject to the Constitution and statutory provisions above (Commerce Clause and Civil Rights Acts of 1875), and is at liberty to deal with such persons as it may select."

And in *Boynton* v. *Virginia*, ... U. S. ....., 81 S. Ct. 182, 5 L. Ed. (2d) 206, The Supreme Court of The United States took care to state:

"Because of some of the arguments made here it is necessary to say a word about what we are not deciding. We are not holding that every time a bus stops at a

wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act. We decide only this case, on its facts, where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers."

I have reviewed all of the cases cited by both the City and the Defendants, and in addition have reviewed subsequent cases of the Court of Appeals and The United States Supreme Court, including the case of *Burton* v. *Wilmington Parking Authority*, handed down on April 17, 1961, and find none applicable or controlling except the *Williams* and *Slack* cases, *supra*.

The Defendants, under South Carolina law, had no right to remain in the stores after the manager asked them to leave. *Shramek* v. *Walker*, 149 S. E. 331, 152 S. C. 88. As the Court quoted the rule, "while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser, and justify the owner in using reasonable force to eject him."

If the manager could have ejected Defendants himself, he could call upon officers of the law to eject them for him.

Since the Defendants refused to leave, they were criminal trespassers under Sect. 16-386 and breached the peace under Sect. 15-909 of The Code of Laws of South Carolina, 1952, and their conviction was proper.

Shelly v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 845, 68 S. Ct. 836, 3 A. L. R. (2d) 441, and *Barrows* v. *Jackson*, 346 U. S. 249, 97 L. Ed. 1586, 73 Supreme Court 1031 cited by the

Defendants are not in point. In both of these cases, there had been a sale of real estate to a non-caucasian in violation of restrictive covenants. In the *Shelly* case, the Court held that the equity of court of the State could not be used against the non-caucasian to enforce the covenant. In the *Barrows* case, the court held that the covenant could not be enforced by an action at law for damages against the co-covenanter, who broke the covenant.

In both of these cases, there were willing sellers and willing purchasers. The purchasers paid their money and entered into possession. Having entered, they had a right to remain.

In the cases before the Court, there were no two willing parties to a contract. True, the Defendants wanted to buy, but the storekeeper did not want to sell and the Defendants had no right to remain after being asked to leave. A white person would not have the right to remain after being asked to leave either. In either case, a person would be a trespasser. The Constitutions provide for equal rights, not paramount rights.

I have only to pick up my current telephone directory and look in the yellow pages to find at least four establishments listed under "Restaurants" that advertise that they are for colored or for colored only.

To say that a white proprietor may not call upon a policeman to remove or arrest a Negro trespasser or a Negro proprietor cannot call upon a policeman to remove or arrest a white trespasser would lead to confusion, lawlessness and possible anarchy. Certainly, the Constitutions intended no such result.

The fundamental fallacy in the argument of Defendants is the classification of the stores and lunch counters as public places and the operations thereof as public carriers.

A person, whatever his color, enters a public place or carrier as a matter of right. The same person, whatever his color, enters a store or restaurant or lunch counter by invitation.

That person's right to remain in a public place depends upon the law of the land, and in a public carrier upon such law and such reasonable rules as the carrier may make, and, under the Constitution, neither the law nor rules may discriminate upon the basis of color.

On the other hand, the same person has no right to enter a store, a restaurant, or lunch counter unless and until invited, and may remain only so long as the invitation is extended. Whether he enters or remains depends solely upon the invitation of the storekeeper, who has a full choice in the matter. The operator can trade with whom he wills, or he can, at his own whim and pleasure, close up shop.

There is no question but that the Defendants are guilty. They were asked to leave and they refused. They, thereupon, were trespassers and such constituted a breach of the peace. In addition, Bouje admittedly resisted a lawful arrest.

The trespass statute (Section 16-386, as amended, Code of Laws of South Carolina, 1952) is not restricted to "pasture or open hunting lands" as Defendants argue. The statute specifically says "any other lands". In Webster's New International Dictionary, the definition of "land" in "Law" is as follows:

> "(a) any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by man, as buildings, fences, etc., extending indefinitely vertically upwards and downwards. (b) An interest or estate in land; loosely any tenement or hereditament."

Order of the Richland County Court

The statute thus applies everywhere and without discrimination as to color. There is no question but that it was designed to keep peace and order in the community.

Since Defendants had notice that neither store would serve Negroes at their lunch counters, they were trespassers *ab initio*. Aside from this however, the law is that even though a person enter property of another by invitation, he becomes a trespasser after he has been asked to leave. *Shramek* v. *Walker, supra.*

For the reasons herein stated, I am of the opinion that the judgments and sentences of the Recorder should be sustained and the Appeals dismissed, and it is so *ordered.*

s/ JOHN W. CREWS,
Judge, Richland County Court.

Columbia, S. C.,
April 28, 1961.

Opinion of Supreme Court of South Carolina

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE CITY OF COLUMBIA,

Respondent,

—v.—

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE and JOHNNY CLARK,

Appellants.

Appeal From Richland County
John W. Crews, County Judge

Case No. 4777
Opinion No. 17857
Filed December 14, 1961

OXNER, A. J.: The five appellants, all Negroes, were convicted in the Municipal Court of the City of Columbia of trespass in violation of Section 16-386 of the 1952 Code, as amended, and of breach of the peace in violation of Section 15-909. Each defendant was sentenced to pay a fine of $100.00 or serve a period of thirty days in jail on each charge but $24.50 of the fine was suspended. From an order of the Richland County Court affirming their conviction, they have appealed.

The exceptions can better be understood after a review of the testimony. The charges grew out of a "sit-down" demonstration staged by appellants at the lunch counter

of the Taylor Street Pharmacy in the City of Columbia, a privately owned business. In addition to selling articles usually sold in drugstores, this establishment maintains a lunch counter in the rear, separated from the front of the store by a partition. The customers sit on stools. The policy of this store is not to serve Negroes at the lunch counter although they are permitted to purchase food and eat it elsewhere. In a sign posted the privilege of refusing service to any customer was reserved.

Shortly after noon on March 15, 1960, appellants, then college students, according to a prearranged plan, entered this drugstore, proceeded to the rear and sat down at the lunch counter. The management had heard of the proposed demonstration and had notified the officers. To prevent violence, three were present when appellants entered. As soon as they took their seats several of the customers at the counter, including a White woman next to whom one of appellants sat, stood up. The manager of the store then came back to the lunch counter. He testified that the situation was quite tense, that you "could have heard a pin drop in there", and that "everyone was on pins and needles, more or less, for fear that it could possibly lead to violence." He immediately told appellants that they would not be served and requested them to leave. They said nothing and continued to sit. At the suggestion of one of the officers, the manager then spoke to each of them and again requested that they leave. One of them stood up and inquired if he could ask a question. As this was done, the other four appellants arose. The manager replied that he did not care to enter into a discussion and a third time told appellants to leave. Instead of doing so, they resumed their seats. After waiting several minutes, the officers arrested all of them and took them to jail.

The foregoing summary is taken from the testimony offered by the State. Only two of the appellants testified. They denied that the manager of the store requested them to leave. They testified that an employee at the lunch counter stated to them, "You might as well leave because I ain't going to serve you", which they did not construe as a specific request. They said after it became apparent that they were not going to be served, they voluntarily left the lunch counter and as they proceeded to do so, were arrested. They denied that any of the White customers got up when they sat down, stating that these customers did so only after the employee at the lunch counter said: "Get up, we will get them out of here."

The questions involved are stated in appellants' brief as follows:

> "I. Did the Court err in refusing to hold that under the circumstances of this case, the arrests and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4).
>
> "A. Was the enforcement of segregation in this case by State Action within the meaning of the Fourteenth Amendment?
>
> "B. Were appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?
>
> "II. Did the State fail to establish the corpus delicti or prove a prima facie case? (Exceptions 1, 2)."

The questions designated I, A and B, must be decided adversely to appellants under City of Greenville v. Peter-

son, filed November 10, 1961, —— S. C. ——, —— S. E. (2d) ——, and City of Charleston v. Mitchell, filed December 13, 1961, —— S. C. ——, —— S. E. (2d) ——. Each of these cases involved a sit-down demonstration at a lunch counter in a privately owned place of business and the precise questions raised by Exceptions 3 and 4 in the instant case were raised in those cases and overruled. In the City of Charleston case we affirmed a conviction for violation of Section 16-386 as amended, which is the same section under which the appellants were convicted.

We think that Question II is based on exceptions too general to be considered. They are as follows:

> "1. The Court erred in refusing to hold that the City failed to prove a prima facie case.
>
> "2. The Court erred in refusing to hold that the City failed to establish the corpus delicti."

The foregoing exceptions do not comply with Rule 4, Section 6 of this Court. They do not point out in what respect the City failed to make out a prima facie case or to establish the corpus delicti. We do not know to which of the two offenses involved these exceptions are directed. We are not aided by appellants' brief. Only scant reference is there made to these two exceptions and apparently the position is taken that their determination is dependent upon the disposition of the other questions which we have held to be without merit.

It has been held that an exception to the effect that the judgment is contrary to the law and the evidence is too general to be considered. State v. Turner, 18 S. C. 103; State v. Cokley, 83 S. C. 197, 65 S. E. 174; State v. Davis, 121 S. C. 350, 113 S. E. 491. The same conclusion has been

reached with reference to an exception "that plaintiff failed to make out a case against defendant." Concrete Mix, Inc. v. James, 231 S. C. 416, 98 S. E. (2d) 841. Other pertinent cases are reviewed in Hewitt v. Reserve Life Insurance Co., 235 S. C. 201, 110 S. E. (2d) 852. It was pointed out in Brady v. Brady, 222 S. C. 242, 72 S. E. (2d) 193, that "every ground of appeal ought to be so distinctly stated that the Court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue."

In oral argument counsel for appellants raised the question of merger of the two offenses and argued that there could not be a conviction on both charges. But this question is not raised by any of the exceptions, is not referred to in the brief of appellants and, therefore, is not properly before us.

Affirmed.

TAYLOR, C.J., LEGGE, MOSS and LEWIS, JJ., concur.

IN THE

SUPREME COURT OF SOUTH CAROLINA

CITY OF COLUMBIA,

Respondent,

—against—

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE and JOHNNY CLARK,

Appellants.

Order of Denial of Petition for Rehearing

(Endorsed on back of Petition for Rehearing)

The within petition for rehearing is denied.

Filed: January 8, 1962.

s/ C. A. TAYLOR C. J.

s/ G. DEWEY OXNER A. J.

s/ LIONEL K. LEGGE A. J.

s/ JOSEPH R. MOSS A. J.

s/ J. WOODROW LEWIS A. J.